IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 851

SIDNEY J. GEFEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

The argument is first raised in the brief in opposition that the action was one to "foreclose a federal tax lien". This statement appearing in the government's brief in opposition as to the nature of the action is clearly contrary to fact as supported by the record. It was not an action to enforce a federal tax lien against taxpayer's property for payment of a penalty and to obtain a deficiency judg-

ment against him. The opening paragraph of the Complaint (R. 7-11) clearly announced:

> "This is a civil action to reduce federal tax claims against the defendant, Sidney J. Gefen, to judgment and to foreclose the federal tax lien against the property of the said defendant."

The foreclosure feature (R. 8) was relatively minor and was only blended in with the common law claim, as is further revealed by the prayer for relief (R. 10):

> I
>
> That this Court adjudge and decree that the defendant, Sidney J. Gefen, is indebted to the United States in the amount of $40,273.25, plus statutory interest thereon according to law.
>
> II
>
> That this Court adjudge and decree that the United States of America has a valid lien against the property belonging to the defendant, Sidney J. Gefen, including the cash surrender value of the aforementioned policy."

Nowhere in the judgment itself is there any mention of a deficiency decree or judgment. To the contrary, the final judgment specifically states (R. 66):

> "4. That the plaintiff, the United States of America, do have and recover from Sidney J. Gefen the sum of $40,273.25, plus statutory interest at the rate of 6% per annum from and after August 23, 1956, to the date of entry of this Judgment in the sum of $24,661.69, less the cash surrender value of Prudential Insurance Company of America Policy No. 599,205 paid over to the United States of America."

The cash surrender value of the Prudential policy on the effective date of the judgment was $3,908.40 (App. 2).

The original 100% penalty assessment was in the sum of $47,991.17 (App. 1).

It is extremely unlikely that Congress, when it enacted the applicable provisions of the Internal Revenue Code, intended (since the laws do not specifically provide) that taxpayers owning an interest in any property be deprived of a jury in contesting 100% penalty assessments. If the intent were to the contrary or if the section of the code specifically so stated the provisions would be clearly unconstitutional, not only as a denial of Seventh Amendment rights, but as regards due process and uniform administration of the laws.

The United States endeavors to convince the court that the claim was wholly equitable, although the opinion of the court below clearly held "[t]he District Court, *as part of its judgment*, foreclosed the federal tax lien on any property of the taxpayers, * * *" (emphasis supplied) (Pet. App. 5). As the matter now stands, under the holding of the opinion below the trial courts [in those instances where the taxpayer is fortunate enough to have even a slight interest in any property] can deny the jury trial because of the fact that the suit to enforce collection is only *part* of the judgment.

What is the practical effect of this position on every officer or employee of every corporation or on a member or employee of every partnership who can be reasonably charged with a duty to perform under the collection provisions? The answer is obvious.

The government need not even file a notice of lien. As in this case, it relied solely upon the notice of the assessment, regardless of whether the assessment was valid.

The argument is also first raised by the government (Res. Brf. 5, ¶ 2) that federal tax lien foreclosure actions

and federal tax collection actions in general are comparatively unimportant. Although the government concedes that the issue presented by petitioner is of limited importance, it attempts to justify and support the asserted relative unimportance of the Seventh Amendment in these cases by three startling propositions:

First. Allegedly, the case below involved foreclosure of the federal lien against the cash surrender value of petitioner's life insurance;

Second. Such a situation is unlikely to arise again because § 6332 of the Internal Revenue Code was amended in 1966 to permit direct levy against such an asset without need for judicial proceedings; and

Third. Federal tax collection actions are comparatively unimportant because the tax authorities do not need the courts in collection matters.

As to the first proposition, neither the Complaint nor the Final Judgment sustain the assertions of the government. The second proposition is remarkable because until now the cited section has never been involved in this case and, even if it were, the 1966 amendment made no change in context as in the manner claimed by the government. Under § 6332 of the Internal Revenue Code prior to the 1966 amendment, direct levy was permitted. The third proposition, which is taken directly from the concluding sentence of paragraph 2 appearing on page 5 of the government's brief in opposition, is stunning to say the least. For the United States to argue that a citizen taxpayer has no rights in the courts as regards the tax collection process is portentous.

The important issue raised needs full consideration on the merits and decision by this Court.

CONCLUSION

As important to this nation as is the prompt collection of its revenues, it cannot be honestly contended that such exceeds the importance of the individual's rights and freedoms conceived in the first instance, by this nation's founders. Rather, it would seem that freedom from whimsical and non-uniform collection methods is as important as freedom from oppression. If the government is correct in its sweeping argument (Res. Brf. 5) that there is a "general principle that there is no constitutional right to jury in federal tax litigation" there is no due process against the power to destroy.

For, after all, as was unequivocally stated by this Court in *Simler* v. *Conner*, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691:

> "The federal policy favoring jury trials is of historic and continuing strength."

Respectfully submitted,

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